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No. 08-625

Supreme Court, U.S.
FILED
OCT 28 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

DOUGLAS B. STALLEY,

Petitioner,

v.

METHODIST HEALTHCARE, SUMNER REGIONAL HEALTH SYSTEMS, INC., ERLANGER HEALTH SYSTEM, WELLMONT HEALTH SYSTEM, MOUNTIAN STATES HEALTH ALLIANCE, COVENANT HEALTH, THE BAPTIST HEALTH SYSTEM OF EAST TENNESSEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiff below, Petitioner here, and his law firm were assessed attorneys' fees and costs on appeal as a sanction pursuant to the Court of Appeals' inherent authority to sanction "bad-faith" conduct where Petitioner and counsel brought novel claims that found support in language from circuit and district court opinions as well as from writings of the sponsor of the legislation at issue. Thus, the questions presented in this petition are:

1. Did the Sixth Circuit apply the correct standard for determining whether Petitioner and his counsels' pursuit of this litigation was in bad faith?

2. Did the Sixth Circuit exceed its inherent authority when it sanctioned Petitioner and his counsel for bad-faith conduct?

3. Did Petitioner and his counsel engage in bad-faith conduct warranting the sanction of attorneys' fees and costs?

PARTIES TO THE PROCEEDING

The following plaintiff, Petitioner here, asserted claims in the trial court and the appellate court:

Douglas B. Stalley

The following entities were defendants in the trial court and court of appeals:

Methodist Healthcare

Sumner Regional Health Systems, Inc.

Erlanger Health System

Wellmont Health System

Mountain States Health Alliance

Covenant Health

The Baptist Health System of East Tennessee

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner affirms that he has no parent company and is not a publicly-owned company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the Sixth Circuit imposing sanctions is reprinted at App. 1 but is not reported. No rehearing of that order was sought. The opinion of the Sixth Circuit deciding the merits of the case and directing Petitioner and his counsel to show cause why sanctions should not be imposed is reported at *Stalley v. Methodist Healthcare*, 517 F.3d 911 (6th Cir. 2008), and is reprinted at App. 6. The order of the Sixth Circuit denying rehearing of the merits opinion is reprinted at App. 25 but is not reported.

JURISDICTION

The Sixth Circuit issued its opinion imposing sanctions in this case on August 4, 2008. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The portion of the Medicare Secondary Payer statute allowing the government to recoup Medicare

payments from any entity responsible for payment, found at 42 U.S.C. § 1395y(b)(2)(B)(iii), and the portion creating a private right of action, found at 42 U.S.C. § 1395y(b)(3), are relevant to this petition. Those sections read as follows in relevant part:

> (iii) Action by United States
>
> In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity. The United States may not recover from a third-party administrator under this clause in cases where the third-party administrator would not be able to recover the amount at issue from the employer or group health plan and is not employed by or under contract with the employer or group health plan at the time the action for recovery is initiated by the United States or for whom it provides

administrative services due to the insolvency or bankruptcy of the employer or plan.

* * * *

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

INTRODUCTION

When this Court held that federal courts could assess attorneys' fees and costs under their inherent powers to sanction bad-faith litigation conduct even where some overlap with Rules and statutes imposing sanctions existed, it simultaneously issued stern and thoughtful warnings about when that power should be used. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980), this Court wrote "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44. Attorneys' fees as a sanction for bad-faith conduct, the Court wrote, are available only when "fraud has been practiced upon" the court, when "the very temple of justice has been defiled," or "when a party shows bad faith by delaying or disrupting the

litigation or by hampering enforcement of a court order." *Id.* at 46 (internal citations and quotations omitted). Quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812), and again citing *Roadway Express*, this Court noted that these powers "cannot be dispensed within a court because they are necessary to the exercise of all others." *Chambers*, 501 U.S. at 43.

The dissenting Justice Kennedy was even more pointed and forceful in his warnings. Harkening back to the "necessary" language, he reminded that "the authority to sanction bad faith litigation practices can be exercised only when necessary to preserve the authority of the court." *Id.* at 64 (Kennedy, J., dissenting) (citing *Roadway Express*, 447 U.S. at 764. "The necessity limitation" he continued, "prescribes the rule for the correct application of inherent powers." *Ibid.* He was critical of the majority for failing to define "bad-faith" litigation conduct, and predicted that "this standardless exercise of judicial power" could be used to "chill the advocacy of litigants" attempting to vindicate federal rights. *Id.* at 68. He also commented that the bad-faith standard, "at least without adequate definition, thwarts the first requirement of due process, namely, that '[a]ll are entitled to be informed as to what the State commands or forbids.'" *Ibid*, (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

Justice Kennedy's concern has come to life in this case. Petitioner filed several lawsuits arguing that the Medicare Secondary Payer statute's (MSP) enforcement provisions, 42 U.S.C. § 1395y(b)(2) and (3),

create a *qui tam*-like statute granting him standing to sue on behalf of the government. This theory found support in language from reported cases and in writings of the sponsor of the statute. *Mason v. Am. Tobacco Co.*, 212 F.Supp.2d 88, 94 (E.D.N.Y. 2002) (holding that the MSP "authorizes a civil proceeding similar to a *qui tam* action" and noting the MSP's "*qui tam*-like" nature); *Manning v. Utilities Mutual Ins. Co.*, 254 F.3d 387 (2d Cir. 2001) (holding the most analogous statute to the MSP is the False-Claims Act, 31 U.S.C. § 3730 (2002), which is a *qui tam* statute, therefore the FCA's statute of limitations applies); *Amicus Curiae* brief of Senator Charles Grassley attached to Petitioner's response to order to show cause. It was, however, a novel theory that had not been tested. The Sixth Circuit determined that the mere attempt to establish his ability to pursue these suits was "bad faith" and sanctioned Petitioner and his counsel by ordering them to pay in excess of $170,000 in attorneys' fees and costs pursuant to its inherent authority. App. 5.

Respectfully, the Sixth Circuit's finding of bad faith in this case is the culmination of a series of opinions from that Circuit straying ever-further away from this Court's admonitions that sanctioning by granting attorneys' fees pursuant to the inherent power of the courts should be used sparingly and in the most extreme circumstances. See *Runfola & Associates v. Spectrum Reporting II*, 88 F.3d 368 (6th Cir. 1996); *Big Yank Corp. v. Liberty Mutual Fire Ins. Co.*, 125 F.3d 308 (6th Cir. 1997); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501

(6th Cir. 2002). The lesson to be learned from this case, and from these cases taken in the aggregate, is that at least in the Sixth Circuit, pressing theories of recovery that are new or novel is done at the risk of sanctions for bad-faith conduct. Thus, advocacy in the Sixth Circuit is "chilled." Moreover, as will be seen, these opinions taken as a whole do not adequately inform litigants "as to what the State commands or forbids."

The Sixth Circuit's path is in conflict with precedent from this Court on the question of when litigation is in "bad faith." This conflict is likely the result of what Justice Kennedy specifically warned of: the bad-faith standard is too ill-defined for consistent application. This Court should grant the writ and review this case to bring the Sixth Circuit's opinion into conformity with Supreme Court precedent, to establish a standard for the imposition of sanctions for bad-faith litigation conduct, and to bring uniformity among the Circuits. See Sup. Ct. R. 10(a) and (c).

STATEMENT OF THE CASE

A. Factual Background.

Petitioner Mr. Stalley filed seven lawsuits in Tennessee district courts alleging that the various defendants violated the MSP. Mr. Stalley never alleged in any of these suits, that he suffered any direct injury. Rather, he alleged that the MSP is a *qui*

tam-like statute granting him standing to sue on behalf of the United States.

The MSP does not contain specific language creating a *qui tam* statute. Mr. Stalley based his theory of *qui tam* standing on several sources. See Affidavits of Kathleen Clark Knight and Kenneth L. Connor filed in support of Plaintiff's response to order to show cause. He relied on language from a district court opinion in *Mason v. Am. Tobacco Co.*, 212 F.Supp.2d 88 (E.D.N.Y. 2002), holding that a class action could not be filed in an MSP suit because the MSP allows a *qui tam* action to be filed. Specifically, the *Mason* court wrote:

> Plaintiffs have moved for class certification. A class action is not appropriate. Class actions allow many small claims to be litigated together, making it cost-effective to prosecute the claims. See, *e.g.*, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-100 n. 11, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). Requiring each individual to bring suit against the tobacco companies to recover their individual Medicare costs would not be cost effective. The MSP statute does not by its terms require each individual covered by Medicare to bring suit. Through a private cause of action any "private attorney general" may sue. The statute does not specify that the action be brought by a person who received the Medicare payment. It authorizes a civil proceeding similar to a *qui tam* action where anyone can bring a claim on behalf of the United States government and receive a bounty. See *e.g.* False

> Claims Act, 31 U.S.C. § 3730 (2002); *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

Id. at 94. This language precisely states Mr. Stalley's standing theory. The Second Circuit affirmed *Mason* without addressing this specific language one way or another. *Mason v. Am. Tobacco Co.*, 346 F.3d 36 (2d Cir. 2003).

A second source of support for the standing theory was found in the reasoning of the Second Circuit in *Manning v. Utilities Mutual Ins. Co.*, 254 F.3d 387 (2d Cir. 2001). In that case, the Second Circuit held that the MSP was analogous to the False Claims Act, thus the False Claims Act's limitations period would apply to an MSP case. In comparing the two statutes, the Second Circuit wrote:

> The FCA is similar to the MSP in that both statutes allow individual citizens, as well as the government, *to sue in order to right an economic wrong done the government*. Both the FCA and the MSP allow for a multiplier of damages to enable the government to recover funds while also providing a financial incentive for private citizens to bring such suits. Both statutes thus create '*private attorneys general*' by authorizing private citizens to receive part of the recovery.

Id. at 394 (emphasis added).

The term "private attorneys general" is a term of art in *qui tam* cases signifying the type of standing

Mr. Stalley asserted, and the False Claims Act is a *qui tam* statute, thus the reasoning and language of the Second Circuit gave credibility to the notion that the MSP was also a *qui tam* statute. Moreover, that the suit is brought "to right an economic wrong done the government" lends support to Mr. Stalley's assertion that the standing any individual enjoys to bring an MSP claim is that of an assignee of the government.

Additionally, Mr. Stalley found support in an *amicus* brief filed by Senator Charles Grassley. Senator Grassley introduced amendments to the MSP in 2003. He wrote that the MSP's double-damages provision is "an important inducement for *private attorneys general to vindicate Medicare's interest in recovering unnecessarily expended funds.*" *Amicus Curiae* brief of Senator Charles Grassley at 17, *Glover v. Philip Morris USA, et al.*, No. 05-1419-JJ (11th Cir.) attached to Plaintiff's response to order to show cause (emphasis added). Again, the use of the term "private attorneys general" and the intention that the MSP is used to recover funds owed to Medicare gave credibility to Mr. Stalley's position.

Unfortunately, no court has agreed with Mr. Stalley. Each of the cases he has filed has been dismissed on standing grounds. The Courts of Appeal that have reviewed those dismissals thus far have affirmed them. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517 (8th Cir. 2007); *Stalley v. Methodist Healthcare*, 517 F.3d 911 (6th Cir. 2008); *Stalley v. Orlando Regional*, 524 F.3d 1229 (11th Cir. 2008).

It is important to note that at the time the complaints were filed, no Circuit had rejected the standing theory. Indeed, even at the time this appeal was filed, no circuit had ruled on it one way or another. The Eighth Circuit was first to rule, and that opinion came after this appeal was perfected. Also of some importance is the fact that Mr. Stalley sought a stay of all but the first-decided district-court case so that the issue could be taken up on appeal, but the various defendants opposed that approach.

The Sixth Circuit went further than simply affirming the district courts and sanctioned Mr. Stalley and his attorneys. While mention is made of sanctions under section 1927 of the United States Code, App. 22, it is very clear from the opinion that sanctions are being imposed for bad-faith litigation conduct pursuant to the Court's inherent authority. App. 22, 23. The sanction imposed is the attorneys' fees and costs incurred by Defendants on appeal. App. 5.

The Sixth Circuit referred to Mr. Stalley as a "'self-appointed bounty hunter' . . . whose goal, apparently, is to profit at the expense of Appellees." App. 21 (quoting *Stalley v. Sumner Regional Health Systems, Inc.*, No. 06-0074, 2007 U.S. Dist. LEXIS 4912, at *2 (M.D. Tenn. Jan. 18, 2007)). It wrote that the his claims "are utterly frivolous, and we are troubled that any attorney would elect to advance them." App. 22. It further concluded, without recitation of specific supporting facts, that "'the claims advanced were meritless, that counsel knew or should have known

this, and that the motive for filing the suit was for an improper purpose such as harassment.'" App. 23 (quoting *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501 (6th Cir. 2002)).

The Sixth Circuit ordered Mr. Stalley and his attorneys to show cause why they should not be sanctioned. Mr. Stalley responded with the arguments set forth above together with supporting affidavits. The Sixth Circuit rejected those arguments and imposed sanctions amounting to $172,823.37, the defendants' actual costs and attorneys' fees incurred on appeal.

B. Proceedings Below.

The suits giving rise to this litigation were filed in the district courts for the Eastern, Middle and Western Districts of Tennessee pursuant to the MSP, thus those courts' jurisdiction was based on a federal question. 28 U.S.C. § 1331; 42 U.S.C. § 1395y(b)(2) and (3). Each complaint was dismissed when the various district courts held that Mr. Stalley lacked standing. Appeals of these final orders were timely filed, thus jurisdiction was appropriate in the Sixth Circuit. 28 U.S.C. § 1291.

The Sixth Circuit issued its opinion disposing of the case on the merits and finding that Mr. Stalley and his counsel had engaged in bad-faith litigation on February 28, 2008. That opinion included an order to show cause why Mr. Stalley and his counsel should not be sanctioned. A petition for rehearing with

suggestion for rehearing *en banc* was denied on May 16, 2008. Petitioner timely responded to the order to show cause. The Sixth Circuit issued its final order awarding fees, the order from which review is sought, on August 4, 2008. No petition for rehearing was sought as to that order.

REASONS FOR GRANTING THE PETITION

This Court should issue the writ and review the Sixth Circuit's opinion for three reasons. While each of these reasons can stand on its own and justify review, they are also intertwined with one another and all in some way harken back the *Chambers* majority's warnings and Justice Kennedy's concerns in dissent. This need for clarification, intertwined in each of the three independent bases set forth below, serves as an overarching justification for review.

The Sixth Circuit's opinion, first, departs from precedents from this Court in two manners, one specific and one general. It does so in a specific sense in that it departs completely from the approach dictated by this Court in an analogous case, *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994). It does so in the general sense that it strays too far from the warnings given in *Chambers* to use the inherent powers to sanction and award fees sparingly and only in the most extreme circumstances. Review is justified on this basis. Sup. Ct. R. 10(c).

Second, the Sixth Circuit's opinion decides an important issue of federal law left open by *Chambers* and *Roadway Express*, namely what amounts to "bad-faith" conduct in litigation. Justice Kennedy's *Chambers* dissent and the scholarship have consistently warned against too broad a definition of "bad faith" lest it chill advocacy. *Chambers,* 501 U.S. at 68 (Kennedy, J., dissenting); Comment, *Sanctions and the Inherent Power: The Supreme Court Expands the American Rule's Bad Faith Exception for Fee Shifting* – Chambers v. NASCO, Inc., 16 Nova L.Rev. 1527 (1992) (hereafter *Sanctions and the Inherent Power*); Note, *A Federal Court has Inherent Power to Assess Attorney Fees as a Sanction for Bad-Faith Conduct, and in a Diversity Case May Employ that Power Without Regard to the Law of the Forum State:* Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991). Nevertheless, the Sixth Circuit has now defined that term very broadly. This Court should grant review to settle this important federal issue. Sup. Ct. R. 10(c).

Finally, the Sixth Circuit's opinion in this case is in conflict with the decision of another circuit. The Eighth Circuit Court of Appeals reviewed the same issues and did not find Mr. Stalley's theory to be "bad-faith" litigation strategy. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517 (8th Cir. 2007). Indeed, that Court recognized that language in "circuit-level opinions" lent credibility to his argument. *Id.* at 522. This conflict merits granting review. Sup. Ct. R. 10(a).

I. THE DECISION BELOW THAT PETITIONER'S LITIGATION CONDUCT WAS TAKEN IN BAD FAITH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This case conflicts specifically with a precedent of this Court. In *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994), the Seventh Circuit sanctioned Mr. McKnight's attorney pursuant to its inherent authority for arguing that section 101 of the Civil Rights Act of 1991 applied retroactively. That Circuit had already decided the issue adversely to him, but this Court had not addressed it. While no circuit split existed on the issue, some district courts had decided the question favorably to Mr. McKight.

In a *per curiam* opinion, this Court granted the writ, vacated the order and remanded the case. According to this Court, it "had not yet ruled" on the issue and filing "an appeal was the only way [Mr. McKnight] could preserve the issue pending a possible favorable decision by this Court. Although . . . there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous." *Id.* at 660.

The Sixth Circuit's decision in this case is in clear and direct conflict with *McKnight*. As set forth above, at least one district court has held that the MSP is a *qui tam* statute. In addition, language from some Circuit Court opinions lends credibility to that argument, as does the *amicus* brief of Senator Grassley. As

in *McKnight*, the answer is "not so clear as to make petitioner's position frivolous." The writ should issue to resolve this conflict.

A more general and overarching conflict exists as well. *Chambers* used strong language to tell lower courts when litigants could be sanctioned for bad-faith conduct. Only when "fraud has been practiced on the court," or when "the very temple of justice has been defiled," or "when a party shows bad faith by delaying or disrupting the litigation or hampering enforcement of a court order" are such sanctions justified. *Chambers*, 501 U.S. at 46. As Justice Kennedy reminded, "the authority to sanction bad faith litigation practices can be exercised only when necessary to preserve the authority of the court." *Id.* at 64 (Kennedy, J., dissenting).

Mr. Stalley and his counsel unquestionably did not delay or disrupt anything, and no order had been issued to hamper. It cannot be said that Mr. Stalley and his counsel committed a fraud or defiled the temple of justice when they based their standing theory on language from cases and from the sponsor of the MSP. Likewise, is there any real question that it was necessary to sanction them "to preserve the authority of the court?" One would think not given that the reasons they set forth for standing find at least some support in the precedents.

Yet, those are the bases needed to impose the sanction of attorneys' fees for bad-faith litigation conduct. The Sixth Circuit's decision conflicts with

the very cases it found its authority from, *Chambers* and *Roadway Express*. It is appropriate to issue the writ to resolve this general conflict with this Court's precedents.

This case is the latest in a series of Sixth Circuit opinions that have strayed ever-further away from the admonitions of *Chambers* and *Roadway Express*. The first was *Runfola & Associates v. Spectrum Sporting II*, 88 F.3d 368 (6th Cir. 1996). That case was a suit between two rival court-reporting businesses. The plaintiff was sanctioned pursuant to Rule 11 of the Federal Rules of Civil Procedure because, after years of litigation and repeated warnings, it failed to produce any evidence of the claims it made yet still did not dismiss the case. *Id.* at 373-74.

The Sixth Circuit affirmed the Rule 11 sanctions. It also, however, affirmed the district court's decision not to impose sanctions pursuant to its inherent authority. *Id.* at 375. It did so at least in part "because the record does not establish the bad faith needed for sanctions under the district court's inherent powers." *Ibid.*

If the Sixth Circuit had not issued any opinions on the topic after *Runfola* and before this case, the most that one might argue is that a conflict exists between the Circuit's own precedents. But it did not stop there. The second case came the next year with *Big Yank Corp. v. Liberty Mutual Fire Ins. Co.*, 125 F.3d 308 (6th Cir. 1997). There, Big Yank sued its workers-compensation insurance carrier for failing to

contest certain workers-compensation claims thereby driving up Big Yank's premiums and forcing it into bankruptcy. The problem with the suit was that the carrier maintained sole discretion to decide the validity of claims, and Big Yank did not contest any of the claims when it had the opportunity to do so. The district court granted summary judgment and also awarded the carrier its fees because "Big Yank had pursued those claims in bad faith." *Id.* at 311.

The Sixth Circuit affirmed the summary judgment but reversed the sanctions ruling. In doing so, it held that the standard for determining bad faith has three elements: the claims advanced are meritless; counsel knew or should have known that they were meritless; and the motive for filing the suit was for an improper purpose such as harassment. *Id.* at 313 (quoting *Smith v. Detroit Fed'n of Teachers, Local 231*, 829 F.2d 1370, 1375 (6th Cir. 1987)). The district court had not made any findings with respect to the bad-faith elements thus it abused its discretion. With *Big Yank* the Sixth Circuit at least attempted to define what bad faith is, but it still refused to impose sanctions even for bringing meritless claims.

Again, had the Sixth Circuit stopped with *Big Yank*, all that might exist is a conflict within the Circuit itself. But the third opinion, *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501 (6th Cir. 2002), demonstrates the complete shift in the Circuit's attitude. In that case, a bank made three claims under its insurance policy owing to wrongful loans made by a vice president. The insurer

agreed with two of the three but could not substantiate the last. It repeatedly sought additional information, which the bank apparently had, but the bank did not provide it. Eventually, the insurer offered to pay the two legitimate claims in exchange for a release, but denied the third until verifying information on that claim was provided.

The bank sued on all three claims. Summary judgment was granted and the district court sanctioned the bank pursuant to its inherent authority for bad-faith conduct in the litigation, and the Sixth Circuit affirmed. The case was meritless, it held, because well-established Ohio law precluded a recovery when a condition precedent was not met, because the insurer had already agreed to pay two claims, and because the bank had the evidence it needed to avoid to the suit altogether yet chose not to produce it. It held that counsel knew or should have known that the claims were meritless essentially because the law was so clear. Finally, and most controversially, it held that the bank's improper purpose was to use the legal system to force the insurer to pay a claim it did not owe under the law.

A strong dissent by Judge Gilman took the majority to task for finding an improper purpose. In his view,

> [a] plaintiff's desire to obtain a monetary judgment that is in fact unwarranted cannot possibly be the sort of 'improper purpose' *Big Yank Corp.* had in mind when shaping the requirements for properly invoking the

> bad-faith exception. Indeed, because the pursuit of unmeritorious claims is unfortunately all too common, this broad interpretation of the 'improper purpose' requirement would bring many cases within the bad-faith exception that, as the Supreme Court has stated, is to be invoked only sparingly.

Id. at 531 (Gilman, J., dissenting).

All three cases presented the same problem. A litigant filed a claim that lacked support and merit. At some point in the litigation, the wiser course would have been to dismiss the case, but the litigant persisted and attempted to save his or her argument by pushing the envelope. All three cases sought money damages. The Sixth Circuit moved from declaring that such conduct is simply not bad faith to requiring a specific finding to affirming an award of sanctions for bad-faith conduct for what is in essence the same behavior. What is notable about the behavior is that none of it even approaches the actions sanctioned in *Chambers* itself.

Then there is this case. Mr. Stalley and his lawyers had reasons for thinking he had standing. The Sixth and Eighth Circuits disagreed with those reasons. But only the Sixth Circuit has ventured down the path of sanctions. This path is far afield from what *McKnight*, *Chambers* and *Roadway Express* countenance. The Sixth Circuit's approach has strayed far away from this Court's directives, and the writ should issue to address this conflict.

II. THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The danger presented by this case and by sanctioning bad-faith litigation conduct is clear and obvious. If too much litigation activity is determined to be in bad faith, advocacy is chilled and rights go unvindicated. The scholarship points to this concern as do the dissents of Justice Kennedy and Judge Gilman. Intertwined with this concern is the due-process demand that litigants should know "what the State commands or forbids." This case allows the Court to weigh in on this important question and define "bad-faith" litigation conduct once and for all.

One commentator summarized the first concern well, writing:

> The American Rule protects a litigant's rights in court by vindicating his substantive rights. Since litigation is never clear, no one should be penalized for merely defending or prosecuting a lawsuit. Awarding fees based on a party's bad-faith pre-litigation conduct disrupts the American Rule's balance between free access to the federal system and penalties for abuses of it. If substantive fee shifting is permitted, anyone with a novel, disputed, or uncertain claim involving a substantial possibility of an adverse judgment will be deterred from bringing suit because of

> the possibility that he could be taxed with his opponent's fees.

Sanctions and the Inherent Power at 1564-65.

The right to access to the courts is fundamental to our system of government and the vindication of other rights. The "American Rule" through which parties pay their own attorneys' fees, as pointed out, is one method of protecting this right. And the right exists not only for sure and certain claims, but also for questionable and difficult ones. If claims and arguments that Courts later determine to be "without merit" do not enjoy that protection, or even if some question exists as to whether they do, then that access is undercut. One can hardly conceive of a more important reason for this Court to issue the writ and grant review.

The due-process concern goes hand-in-hand with the concern for chilling advocacy, but naturally precedes it. The point here is that litigants are entitled to know in advance what conduct is subject to being sanctioned for bad faith and what is not. "The difficulty is that reasonable federal judges may differ as to what amounts to bad-faith conduct. Consequently, a litigant might never know when to curtail vigorous litigation, and one federal court may regard certain conduct as bad faith while another may not." *Sanctions and the Inherent Power*, at 1562.

This case is a perfect example. The Eighth Circuit found nothing offensive about Mr. Stalley's litigation conduct or his counsel's. Indeed, that Court

noted that his claim for standing found some support in circuit-level opinions. While it ultimately disagreed with his reasoning, it certainly did not even hint that the conduct was in bad faith. Conversely, the Sixth Circuit looked at the very same reasoning and the very same conduct and found bad faith. Due process requires more. It demands that litigants know what actions will be sanctionable and what actions will not.

It is interesting to peruse the various Circuit opinions on the topic of "bad-faith" litigation conduct. What becomes readily apparent is that the Circuits have struggled to determine precisely what bad faith means and what conduct amounts to bad faith. *U.S. v. Seltzer*, 227 F.3d 36 (2d Cir. 2000) (failure to get to court on time may be bad faith but the record must be developed); *In re Generes*, 69 F.3d 821 (7th Cir. 1995) (frivolous appeal in which the result was foreordained by the lack of substance to the arguments is bad faith); *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001) (making reckless statements of law and fact for an improper purpose is bad faith); *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003) (mere ignorance or inadvertence is not bad faith); *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir. 2002) (purposeful violation of Rule 412 of the Federal Rules of Evidence and misleading the court in doing so is bad faith). What might be "bad faith" in one circuit may not be bad faith in another, and it is terribly difficult if not impossible to predict in advance what conduct falls within the standard even after reading the precedents. Again, due process requires more.

This case offers the Court an opportunity to address these important federal issues. Litigants deserve to know precisely what the boundaries are so that they may conform their conduct to them. The writ should issue to set this standard.

III. THE DECISION BELOW DECIDES IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH OTHER UNITED STATES COURTS OF APPEALS.

The final reason for issuing the writ, the conflict in the circuits, has already been set forth in the previous discussion. The Eighth Circuit Court of Appeals examined this same theory of standing and did not even hint that the conduct of Mr. Stalley and his counsel was taken in bad faith. Indeed, that circuit acknowledged the circuit-level support for the argument. Conversely, the Sixth Circuit entered sanctions for bad-faith conduct. These opinions cannot be reconciled.

It is true that the Eighth Circuit opinion preceded the Sixth Circuit sanctions. That misses the point. The point to be made is first that the conduct was the same and second that the Eighth Circuit noted the basis for Mr. Stalley's argument before ultimately rejecting it. Again, the opinions conflict and justify issuing the writ.

Likewise, as noted above, the opinions from the various Circuits demonstrate inconsistency in deciding and a struggle with identifying "bad-faith"

litigation conduct. *U.S. v. Seltzer*, 227 F.3d 36 (2d Cir. 2000); *In re Generes*, 69 F.3d 821 (7th Cir. 1995); *Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001); *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003); *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir. 2002). No other Circuit, however, has gone nearly so far as the Sixth Circuit and imposed sanctions for a legal theory that it simply determined had no merit. All of these opinions require something more; indeed much more like an intent to mislead the court, *B.K.B.*, or a result that was "foreordained" by the facts and the precedents yet pressed nevertheless, *Generes*. The Sixth Circuit's approach conflicts with these opinions to the extent that it reaches so much further than any Circuit opinion.

Yet, to come full circle, what hopefully is most apparent from this petition is that the Circuits are confused by the standard more than being in conflict over it. One leaves the cases almost with a sense that the courts simply have not identified a logical, predictable method for finding 'bad-faith" conduct. The predictable result is the conflict and confusion revealed by the cases. The Court should issue the writ and resolve the conflict once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

October 28, 2008

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Nos. 07-5077, 07-5147, 07-5358, 07-5360, 07-5362, 07-5363, 07-5364

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOUGLAS B. STALLEY, Plaintiff-Appellant, v. METHODIST HEALTHCARE, et al., SUMNER REGIONAL HEALTH SYSTEMS, INC., et al., ERLANGER HEALTH, et al., WELLMONT HEALTH SYSTEM, et al., MOUNTAIN STATES HEALTH ALLIANCE, et al., COVENANT HEALTH, et al., THE BAPTIST HEALTH SYSTEM OF EAST TENNESSEE, et al., Defendants-Appellees.	ORDER (Filed Aug. 4, 2008)

BEFORE: RYAN, BATCHELDER, and GRIFFIN, Circuit Judges.

Plaintiff Douglas B. Stalley filed seven separate lawsuits in the United States District Court for the Eastern, Middle, and Western Districts of Tennessee, claiming in each case that the named defendants, respectively, Methodist Healthcare, Sumner Regional Health Systems, Inc., Erlanger Health, Wellmont Health System, Mountain States Health Alliance, Covenant Health, and The Baptist Health System of

East Tennessee, violated the Medicare Secondary Payor Act (MSP), 42 U.S.C. § 1395y(b), Each of the district courts dismissed Stalley's claims, holding that the MSP is not a *qui tam* statute, and therefore, that Stalley lacked Article III standing to bring the lawsuits. Stalley appealed all seven judgments. We consolidated the cases and after briefing and oral argument, affirmed the district courts' judgments. All of these cases were dismissed. *Stalley v. Methodist Healthcare*, 517 F.3d 911, 919, 920 (6th Cir. 2008), *rehearing and rehearing en banc denied* May 16, 2008.

I.

We observed in our opinion, *Stalley*, 517 F.3d at 919-20, that the seven cases before us were virtually identical to dozens of lawsuits Stalley had filed in federal courts in Arkansas, Florida, and Pennsylvania, all of which were dismissed for Stalley's lack of standing. We held that Stalley's claims were utterly meritless and noted that courts of appeals in every circuit court that addressed Stalley's claims held that he lacked standing. Not only was Stalley unable to cite a single appellate court decision to support his theory, he was also unable to point to a single law review article in support of his position. Numerous district and appellate courts had rejected Stalley's theory. We held that Stalley's appeals were "utterly frivolous, and [that] we are troubled that any attorney would elect to advance them." *Id.*

We entered an order consistent with Fed. R. App. P. 38, requiring Stalley to show cause "why this court should not impose sanctions in the form of costs and/or attorney's fees for [Stalley's] prosecution of [the] unreasonable and vexatious appeals" before us.

Stalley responded, arguing that his appeal was not frivolous because he had established a reasonable question of law, citing a single district court opinion from another circuit that mentioned, in *dictum*, that the MSP afforded a *qui tam* action. *See Mason v. Am. Tobacco Co.*, 212 F. Supp. 2d 88 (E.D.N.Y. 2002). Notably, on appeal, the Second Circuit did not approve or even mention the idea that the MSP was a *qui tam* statute. *See Mason v. Am. Tobacco Co.*, 346 F.3d 36 (2d Cir. 2003).

Stalley also argued that there was a circuit split on the issue, citing to cases in the Second, Eighth, and Eleventh circuits. But none of the circuit court cases Stalley cited to actually holds that the MSP confers standing on private attorneys general. In *Manning v. Utilities Mutual Ins. Co.*, 254 F.3d 387 (2d Cir. 2001), the court compared the MSP to the False Claims Act, 31 U.S.C. § 3731(b)(1), in order to determine the MSP's applicable statute of limitations, but never held that the MSP afforded a private right of action for a non-injured party. In *Glover v. Liggett Group, Inc.*, 459 F.3d 1304 (11th Cir. 2006), the court held that the MSP created "no cause of action against an alleged tortfeasor whose responsibility to pay medical costs had not been established." In that case, the claimants were Medicare beneficiaries. Finally, in

Stalley v. Catholic Health Initiatives, 509 F.3d 517 (8th Cir. 207), the court explicitly held that the MSP was not a *qui tam* statute. Not only is there not a circuit split, but none of the cases Stalley cited works in his favor.

We rejected Stalley's argument, concluding that Stalley's appeals were "entirely frivolous" and that we would impose sanctions. On April 30, 2008, we issued an order directing the defendants to "submit proper documentation . . . of the defendants' actual costs and attorney fees expended in defending this appeal." Stalley was provided an opportunity to respond, and did so.

The defendants submitted documentation and affidavits in response to this order, providing a detailed breakdown of fees and costs. In response, Stalley did not challenge either the incurrence or the reasonableness of the defendants' fees and costs, but simply reiterated that his appeal was not frivolous because it presented an argument having substantial merit.

Stalley filed a motion for reconsideration of the April 30, 2008, order, as well as a motion for rehearing and rehearing *en banc* of the original appeal. We denied both motions.

II.

Having carefully reviewed the affidavits and supporting documents the defendants have submitted

regarding their actual costs and attorney fees in defending this frivolous appeal, we now impose sanctions on both Douglas B. Stalley and his appellate counsel, Wilkes & McHugh, P.A., jointly and severally, in the amount of $172,823.37, to be divided among the defendants as follows:

Methodist Healthcare – $15,394.24

Sumner Regional Health Systems, Inc. – $25,261.94

Erlanger Health – $30,574.84

Wellmont Health System – $18,726.75

Mountain States Health Alliance – $15,394.24

Covenant Health – $40,064.75

The Baptist Health System of East Tennessee – $27,406.61

Stalley and his attorneys shall have fourteen days from the date of entry of this order to make payment to the clerk's office.

ENTERED BY ORDER OF
THE COURT

/s/ [Illegible]
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-5077 DOUGLAS B. STALLEY, *Plaintiff-Appellant*, *v.* METHODIST HEALTHCARE, *Defendant-Appellee.* No. 07-5147 DOUGLAS B. STALLEY, *Plaintif-Appellant*, *v.* SUMNER REGIONAL HEALTH SYSTEMS, INC., *Defendant-Appellee.* No. 07-5358 DOUGLAS B. STALLEY, *Plaintif-Appellant*, *v.* ERLANGER HEALTH SYSTEM, *Defendant-Appellee.* Nos. 07-5360/5362/5364 DOUGLAS B. STALLEY, *Plaintif-Appellant*, *v.*	Nos. 07-5077/5147/5358/ 5360/5362/5363/5364

WELLMONT HEALTH SYSTEM (07-5360), MOUNTAIN STATES HEALTH ALLIANCE (07-5362), THE BAPTIST HEALTH SYSTEM OF EAST TENNESSEE (07-5364),
Defendants-Appellees.

No. 07-5363

DOUGLAS B. STALLEY,
Plaintif-Appellant,
v.
COVENANT HEALTH,
Defendant-Appellee.

Appeal from the United States District Courts for the Western District of Tennessee at Memphis, the Middle District of Tennessee at Cookeville, and the Eastern District of Tennessee at Chattanooga, Greeneville, and Knoxville.
Nos. 06-02605; 06-00074; 06-00194; 06-00217; 06-00216; 06-00359; 06-00295 – Jon Phipps McCalla, Robert L. Echols, District Judges; Curtis L. Collier, Chief District Judge.

Argued: December 4, 2007

Decided and Filed: February 28, 2008

Before: RYAN, BATCHELDER, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kenneth L. Connor, WILKES & MCHUGH, Leesburg, Virginia, for Appellant. Edward

K.M. Bilich, JONES DAY, Washington, D.C., Daniel M. Stefaniuk, SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, Tennessee, John L. Miller, WAGNER, MYERS & SANGER, Knoxville, Tennessee, Reuben N. Pelot IV, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, for Appellees. **ON BRIEF:** Kathleen C. Knight, WILKES & McHUGH, Tampa, Florida, for Appellant. Edward K.M. Bilich, Gregory M. Luce, Paul R. Reichert, JONES DAY, Washington, D.C., Daniel M. Stefaniuk, Fred H. Moore, SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, Tennessee, Reuben N. Pelot IV, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, Robert L. Trentham, MILLER & MARTIN, Nashville, Tennessee, Martin B. Bailey, WAGNER, MYERS & SANGER, Knoxville, Tennessee, for Appellees.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Douglas B. Stalley ("Stalley") filed seven separate lawsuits in the district courts in Tennessee – in addition to numerous cases in other jurisdictions against different defendants – claiming that Defendants-Appellees Methodist Healthcare ("Methodist"), Sumner Regional Health Systems, Inc. ("Sumner"), Erlanger Health System ("Erlanger"), Wellmont Health System ("Wellmont"), Mountain States Health Alliance ("Mountain States"), Covenant

Health ("Covenant"), and The Baptist Health System of East Tennessee ("Baptist")[1] (collectively referred to as "Appellees") all violated the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. § 1395y(b). In none of the virtually identical complaints does Stalley allege any direct injury. Instead, the complaints are premised on his belief that the MSP is a *qui tam* statute granting him standing to sue as a private attorney general. The several district courts, following the clear language of the MSP and a plethora of case law, separately ruled that the MSP is not a *qui tam* statute and, therefore, Stalley does not have Article III standing to raise these claims. Stalley appeals those decisions. Because we find no basis upon which to hold that the MSP is a *qui tam* statute, and no basis upon which to find that Stalley can otherwise demonstrate standing, we **AFFIRM** the judgments of the district courts.

I. BACKGROUND

A. Procedural History

Stalley sued Appellees complaining that they violated the MSP by failing to reimburse Medicare for unspecified payments that Medicare supposedly advanced to treat unspecified medical errors made with regard to unspecified Medicare beneficiaries at unspecified health care facilities owned by Appellees.

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[1] Stalley also sued unnamed John Does 1 through 10 in each of the complaints.

Appellees all filed motions to dismiss, asserting that Stalley lacked standing to raise his claim, Fed. R. Civ. Proc. 12(b)(1),[2] and that Stalley failed to state a claim upon which relief may be granted, Fed. R. Civ. Proc. 12(b)(6).

The District Court for the Eastern District of Tennessee consolidated the actions filed in that district, namely, those against Erlanger, Wellmont, Mountain States, Covenant and Baptist, and dismissed the claims, both because Stalley lacked Article III standing to assert them and because Stalley failed to state a claim upon which relief could be granted. The District Court for the Middle District of Tennessee dismissed Stalley's complaint against Sumner on the same grounds. Finally, the District Court for the Western District of Tennessee dismissed Stalley's claim against Methodist, holding that Stalley lacked standing to assert his claim; the court did not address the question of whether Stalley had raised a claim upon which relief could be granted. All of the district courts held that the MSP is not a *qui tam* statute. Stalley timely appealed all three decisions, and the cases were consolidated for appeal because they raise identical issues of law and fact as to all Appellees.

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[2] Although Covenant conceded that Stalley had standing to raise his claim, we are not bound by that concession, but must satisfy ourselves not only of our own jurisdiction, but also of that of the district court. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

B. The Medicare Secondary Payer Statute

Medicare is a federal health insurance program that provides health insurance benefits to people 65 years of age or older, disabled people, and people with end-stage renal disease. 42 U.S.C. § 1395c. For a number of years, Medicare served as the primary payer of health costs for eligible individuals. *Mason v. American Tobacco Co.*, 212 F.Supp.2d 88, 91 (E.D.N.Y. 2002). In 1980, however, Congress enacted the MSP to counteract escalating health-care costs. *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 21 (1st Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 1104 (2008). The MSP "makes Medicare the secondary payer for medical services provided to Medicare beneficiaries whenever payment is available from another primary payer." *Id.* "This means that if payment for covered services has been or is reasonably expected to be made by someone else, Medicare does not have to pay." *Cochran v. United States Health Care Fin. Admin.*, 291 F.3d 775, 777 (11th Cir. 2002). Consequently, the MSP makes Medicare a secondary payer and designates certain private entities – such as a group health plan, a worker's compensation plan, or an automobile or liability insurance plan – as "primary payers" that have the responsibility to pay for a person's medical treatment. *See Glover v. Philip Morris USA*, 380 F.Supp.2d 1279, 1282 (M.D. Fla. 2005); *see also* 42 U.S.C. 1395y(b)(2)(ii). If the primary payer has not paid and will not promptly do so, however, Medicare can conditionally pay the cost

of the treatment. *United Seniors,* 500 F.3d at 21 (citing 42 U.S.C. § 1395y(b)(2)(B)).

The MSP empowers Medicare to seek reimbursement for any conditional medical payments from the primary payer – or from the recipient of the payment – if it is demonstrated that the primary payer has responsibility to pay. *Id.* (citing 42 U.S.C. § 1395y(b)(2)(B)); *see also Cochran,* 291 F.3d at 777 ("The way the system is set up the beneficiary gets the health care she needs, but Medicare is entitled to reimbursement if and when the primary payer pays her."). One demonstrates that a primary plan is responsible for reimbursing Medicare by showing a "judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." 42 U.S.C. § 1395y(b)(2)(B)(ii).

In order "to facilitate recovery of conditional payments, the MSP provides for a governmental action against any entity that was responsible for payment under a primary plan, 42 U.S.C. § 1395y(b)(2)(B)(iii), and subrogates the United States to the rights of a Medicare beneficiary to collect payment under a primary plan for items already paid by Medicare, § 1395y(b)(2)(B)(iv)." *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1307 (11th Cir. 2006). "The MSP also creates a private right of action with double recovery to encourage

private parties who are aware of non-payment by primary plans to bring actions to enforce Medicare's rights." *Id.* (citing 42 U.S.C. § 1395y(b)(3)(A)). Stalley contends that the MSP private right of action is actually a *qui tam* provision, allowing any individual to bring a suit on behalf of the United States.

II. STANDARD OF REVIEW

We review de novo a district court's dismissal of a case for lack of standing – lack of subject matter jurisdiction – under Fed. R. Civ. Proc. 12(b)(1). *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 348 (6th Cir. 2007) (citing *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n,* 389 F.3d 536, 540 (6th Cir. 2004)).

III. ANALYSIS

A. The MSP is not a *qui tam* statute.

Stalley, as the party invoking federal subject matter jurisdiction, has the burden of demonstrating that he satisfies each element of Article III standing. *Courtney v. Smith,* 297 F.3d 455, 459 (6th Cir. 2002) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)); *see also Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 771 (2000) ("As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing."). "The irreducible constitutional minimum of standing contains three elements." *Lujan,* 504 U.S. at 560. First, Stalley must

show that he has suffered an "injury" in fact. *Id.* He must have suffered "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vt. Agency,* 529 U.S. at 771 (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990)). Second, Stalley must establish a causal connection between the alleged injury and the Appellees' conduct of which he complains. *Lujan,* 504 U.S. at 560. That is, the injury must be "fairly traceable" to the Appellees' actions. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976)). Third, Stalley must demonstrate that the injury is redressable in this action. *Vt. Agency,* 529 U.S. at 771. There must be a "substantial likelihood," *id.,* as opposed to mere speculation, that a favorable decision in this court will redress Stalley's alleged injury, *Lujan,* 504 U.S. at 561.

Stalley does not claim that Appellees' alleged conduct injured him personally. He does not allege that he is a Medicare beneficiary, that he is Medicare eligible, or that he was denied by some primary payer coverage for a medical procedure. Thus, it is irrefutable that Stalley does not have standing in the traditional sense to bring this action. Stalley's claim is that the MSP – because of the provision for a private right of action set out in 42 U.S.C. § 1395y(b)(3) – is actually a *qui tam* statute that affords Stalley standing to bring his claims on behalf of the United States as a private attorney general. Therefore, we must decide whether the MSP is in fact a *qui tam* statute.

A *qui tam* statute allows a private person to bring an action in the name of the United States, that will benefit both the person and the government. *Vt. Agency,* 529 U.S. at 769. The *qui tam* action is for redress of an injury to the government; it is the government's injury that confers standing upon the private person, *id.* at 773-74, 777-78, and the *qui tam* plaintiff has standing because he is a partial assignee of the United States's claims against a defendant, *id.* at 773. As the *Vt. Agency* Court's detailed account of the history of *qui tam* actions makes clear, in the United States, the right to bring a *qui tam* action is entirely created by statute. *See id.* at 774-78; *see also United Seniors,* 500 F.3d at 23-24 ("There presently is no common-law right to bring a qui tam action, which is strictly a creature of statute.") (citing *Conn. Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81, 84 (2d Cir. 1972)). And only in dictum has the Court indicated that the right to bring a *qui tam* action might be inferred from a statute's terms rather than explicitly conferred. *See Vt. Agency,* 529 U.S. at 777, n.5 ("We have suggested, in dictum, that 'statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue.'" *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541, n.4 (1943)).

The False Claims Act ("FCA") is the most commonly invoked *qui tam* statute. *Id.*[3] Indeed, it is no exaggeration to say that the FCA – or its predecessor – is virtually the *only qui tam* statute whose invocation is actually the subject of any Supreme Court case law handed down in this century or the last. Hence, it is the FCA that is the benchmark for evaluating other statutes claimed to be *qui tam* statutes.

The FCA explicitly provides that "a person may bring a civil action . . . for the person *and for the United States Government,*" 31 U.S.C. § 3730(b)(1) (emphasis added); that is, the plain language of the FCA empowers private individuals to sue on behalf of the United States. Furthermore, the United States remains the real party in interest in a *qui tam* suit

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[3] In a footnote, the Court went on to say that, in addition to the FCA:

> [t]hree other *qui tam* statutes, all also enacted over a hundred years ago, remain on the books. *See* 25 U.S.C. § 81 (providing cause of action and share of recovery against a person contracting with Indians in an unlawful manner); § 201 (providing cause of action and share of recovery against a person violating Indian protection laws); 25 U.S.C. § 292(b) (providing cause of action and share of recovery against a person falsely marking patented articles).

It is worth noting that the first of these three, 25 U.S.C. § 81, has been entirely redrafted, and the *qui tam* provision removed, *see* 25 U.S.C. § 81 (2000). Further, the Court's footnote also included, by way of comparison to the *qui tam* statutes, two statutes that provide for forfeiture to an informer of a share of property, but do not authorize suit by the informer, *viz.*, 18 U.S.C. § 962 and 46 U.S.C. § 723.

brought under the FCA, while the "private attorneys general," or "relators," benefit from the action by sharing with the government in the monetary recovery of the lawsuit. *United Seniors*, 500 F.3d at 25; 31 U.S.C. § 3730(d).

The FCA tightly regulates the actions that private plaintiffs may bring under its provisions. For example, the private plaintiff must bring the action in the name of the United States, 31 U.S.C. § 3730(b)(1); the action can be dismissed only with the written consent of the court and the Attorney General, *id.*, but may be dismissed without the consent of the private plaintiff, *id.* at (c)(2)(A); before serving the complaint on the defendant, the private plaintiff must file it with the court, in camera, and disclose substantially all of the material evidence to the government, *id.* at (b)(2). Of particular importance, the right of the private plaintiff to any recovery in the action is strictly limited, *id.* at (d); and the government may elect to proceed with – and therefore conduct – the action, or decline to do so, *id.* at (b)(4); but even if the government elects not to proceed with the action, it retains a significant role in the way the action is conducted, *id.* at (c)(3) and (4).

The MSP, which Stalley would have us declare a *qui tam* statute, differs significantly from the FCA. First, the MSP contains no provision permitting a private plaintiff to bring an action on behalf of the United States. Rather, the MSP provides for two separate causes of action: one by the United States, 42 U.S.C. § 1395y(b)(2)(B)(iii); the other by private

individuals, 42 U.S.C. § 1395y(b)(3)(A). The provision in the MSP creating a private right of action contains no language requiring that the private plaintiff bring the action on behalf of the United States. As the First Circuit pointed out in *United Seniors,* had Congress intended that the private action authorized by the MSP be brought on behalf of the United States, it would surely have made that clear in the language of the statute, inasmuch as "Congress created the causes of action in FCA § 3730(b) and MSP § 1395y(b)(3)(A) during the *same month* in 1986." *United Seniors,* 500 F.3d at 24. Congress could have explicitly made the MSP a *qui tam* statute, but it did not.

Second, the MSP does not contain the procedural safeguards that are part of the FCA. For example, among other things, the FCA provides that: (1) the relator must serve the complaint and a written disclosure of material evidence on the United States before service to the defendant; (2) the relator must file the complaint under seal while the government conducts an investigation; (3) the government may intervene if it so elects; (4) the government may settle the case over the objections of the relator; and (5) the government must give consent before the case can be dismissed. 31 U.S.C. § 3730(b)-(f); *see also United Seniors,* 500 F.3d at 25 n.8. Those procedural safeguards exist to ensure that the government – and in particular the executive branch – retains some control of a *qui tam* action and can determine the extent to which it will participate. *United Seniors,* 500 F.3d

at 25 (citing *Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001)); *see also United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (In a *qui tam* suit, "the government may take complete control of the case if it wishes."). None of these procedural safeguards are present in the MSP, and the statute's provision creating a private right of action contains no hint of any intent that the United States – and not the private plaintiff – is the real party in interest in an action brought under that provision. *See United Seniors*, 500 F.3d at 25.

Third, the MSP does not contemplate that the plaintiff share a monetary judgment with the government. The FCA explicitly limits the private plaintiff's percentage of the money recovered, with the government receiving the lion's share. *See e.g.* 31 U.S.C. § 3730(d)(1), (2) (providing that an FCA relator receive not more than 25% of the bounty in a government-prosecuted case, and 25-30% of the bounty in a case the government declines to prosecute); *United Seniors*, 500 F.3d at 25; *see also Vt. Agency*, 529 U.S. at 777, n.6 (summarizing history of *qui tam* statutes' division of bounty). The MSP, however, authorizes the private plaintiff to recover the entire bounty, 42 U.S.C. § 1395y(b)(3)(A), although explicitly authorizing the United States to file its own action for the same damages for which the private plaintiff may sue. 42 U.S.C. § 1395y(b)(2)(B)(iii). There is no mention of percentages or a requirement that the private plaintiff share the bounty with the

government. *United Seniors,* 500 F.3d at 25. Finally, even if the statute could be read to create a right of subrogation in the government to the rights of the private plaintiff, *see id.* (suggesting that the government might have such a right pursuant to MSP § 1395y(b)(2)(B)(iii) or (iv)), such a right would hardly be consonant with the purpose of a *qui tam* statute, which is to provide for an action that will benefit the government as well as the private plaintiff. If the government receives no direct benefit from the lawsuit, it is disingenuous to claim that the suit is brought for the government's benefit and on its behalf.

Lastly, Stalley presents no evidence, whether from the legislative history or otherwise, that Congress intended the MSP to be a *qui tam* statute. The fact that Congress explicitly created the current *qui tam* provisions of the FCA the same month it created the private right of action in the MSP certainly belies Stalley's contention. If Congress had intended to transform the MSP into a *qui tam* statute it could have done so explicitly. But Congress did not do so.

Stalley has presented this same argument before several different tribunals, all of which have held that the MSP is not a *qui tam* statute and that Stalley does not have standing to sue on behalf of the United States. In fact, at oral argument Stalley's counsel admitted that no case – not even in a concurrence or dissent – supports the proposition that the MSP is a *qui tam* statute. When pressed, counsel

could not point to so much as a law review article in support of Stalley's position.

We now join all of the other courts that have ruled on the issue and hold that the MSP's private right of action provision does not transform the MSP into a *qui tam* statute. Because we find that the MSP is not a *qui tam* statute, we conclude that Stalley does not have Article III standing to assert his claims. Therefore, we need not decide the issue of whether Stalley's complaints stated claims upon which relief can be granted.

B. Sanctions are appropriate against Stalley and his counsel.

Rather than acting as a private attorney general to benefit the United States, Stalley proceeds in these cases as a "self-appointed bounty hunter," *see Stalley v. Sumner Regional Health Systems, Inc.*, No. 06-0074, 2007 U.S. Dist. LEXIS 4912, at *2 (M.D. Tenn. Jan. 18, 2007), whose goal, apparently, is to profit at the expense of Appellees. As counsel admitted at oral argument, not even so much as a law review article, much less a case, supports Stalley's claim that the MSP is a *qui tam* statute, while numerous cases explicitly hold to the contrary. Stalley cannot point to even a passing reference in the legislative history of the MSP to bolster his position. He has literally no support whatsoever for his argument. Moreover, Stalley – along with his partner in litigation, Erin Brockovich – has made the exact same claims

numerous times in other jurisdictions and been unanimously turned away.[4] Stalley's claims before this court are utterly frivolous, and we are troubled that any attorney would elect to advance them.

We have the inherent power to punish with sanctions those who litigate in bad faith. *Jones v. Continental Corp.*, 789 F.2d 1225, 1229 (6th Cir. 1986) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). These powers come not from rule or statute but from "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). Our inherent powers include the ability to "fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 44. Furthermore, we also have statutory authority to assess costs and attorney's fees against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. A "court may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers*, 501 U.S. at 45-46 (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975)). Before awarding attorney's fees to the prevailing party under the "bad faith exception," we must

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[4] We note from Appellee Methodist's brief, for example, the existence of no less than 18 district court cases, filed by either Stalley or Brockovich, rejecting the legal claims herein asserted.

find that "the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512 (6th Cir. 2002) (internal citations omitted). Our inherent power is not limited to sanctioning attorneys only; we can sanction a party as well. *See Chambers*, 501 U.S. at 48. While we should exercise this power with restraint and discretion, *id.* at 44, we should not shrink from exercising it when sanctions are justified by the circumstances.

Without question, Stalley and his attorneys know that he has no standing to raise the claims he asserts against the Appellees. Stalley cited no legal authority for his contention that the MSP is a *qui tam* statute, and he has failed to persuade a single one of the many other courts in which he has raised this claim. He cannot claim that he is arguing for a good-faith extension of the law, because Congress must explicitly create *qui tam* statutes. *See United Seniors*, 500 F.3d at 23-24 ("There is presently no common-law right to bring a *qui tam* action, which is strictly the creature of statute."). We have no power to create a *qui tam* cause of action where none exists. Therefore, we can come to only one conclusion: Stalley and his attorneys have continued to pursue these claims against Appellees for an improper purpose.

We may not assess attorney's fees "without fair notice and an opportunity for a hearing on the record." *Roadway Express*, 447 U.S. at 767. Although a

full evidentiary hearing is not required before we may impose sanctions, we must provide Stalley and his attorney's the opportunity to be heard. *Cook v. American S.S. Co.*, 134 F.3d 771, 774-75 (6th Cir. 1998). Accordingly, we will enter an order, contemporaneously with our filing of this opinion, instructing Stalley and his counsel to show cause why we should not impose sanctions, in the form of attorneys fees or costs or both, against Stalley and his attorneys for prosecuting these unreasonable and vexatious appeals.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgments of the district courts dismissing these complaints for lack of standing.

Nos. 07-5077/5147/5358/5360/5362/5363/5364

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS B. STALLEY, Plaintiff-Appellant, v. SUMNER REGIONAL HEALTH SYSTEMS, INC., ET AL., Defendants-Appellees.	)	ORDER (Filed May 16, 2008)

BEFORE: RYAN, BATCHELDER, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Judge Sutton recused himself from participation in this ruling.

submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk